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In the
Supreme Court of the United States

October Term, 1957

No. 146

THE UNITED STATES,

Petitioner

v.

HOWARD A. McNINCH, D/B/A THE HOME COM-
FORT CO., ROSALIE McNINCH AND GARIS P.
ZEIGLER; FREDERICK L. TOEPPLEMAN; AND
CATO BROS., INC., WILFRED R. CATO; WILLIAM
R. CATO, AND MAGIE L. DUNN (NEE: MAGIE
L. STONE),

Respondents

On Writ of Certiorari to The United States
Court of Appeals for the Fourth Circuit

BRIEF FOR CATO BROS., INC., WILFRED R. CATO,
WILLIAM R. CATO, AND MAGIE L. DUNN
(NEE: MAGIE L. STONE)

A. C. EPPS
CHARLES W. LAUGHLIN
506 Mutual Building
Richmond 19, Virginia
*Counsel for Cato Bros., Inc.,
Wilfred R. Cato, William R.
Cato, and Magie L. Dunn
(nee: Magie L. Stone)*

CHRISTIAN, BARTON, PARKER & BOYD
Of Counsel

TABLE OF CONTENTS

	<i>Page</i>
STATUTES INVOLVED	1
QUESTION PRESENTED	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. A False Claim Against Commodity Credit Corporation, a Wholly-Owned Government Corporation, Is Not a False Claim Against the Government of the United States Within the Meaning of Section 5438 of the Revised Statutes of 1878; Hence No Penalties Can Be Exacted Under Section 3490 of the Revised Statutes of 1878	6
A. Respondents Are Liable to the United States Under Section 3490 Only if They Committed Acts Prohibited by Section 5438 As the Latter Section Read in 1878	7
B. The Entire Legislative History of Section 5438 Shows Beyond a Doubt That a Government Corporation Was Not Included Within the Scope of the Section in 1878 When It Was Incorporated by Section 3490	9
C. Judicial Construction Has Determined That Govern- ment Corporations Were Not Included in Section 5438 in 1878 and in Acts Using Similar Phraseology Adopt- ed During That Period	16
II. It Will Be Error for This Court to Give a Liberal Con- struction to Section 5438 So As to Include a Government Corporation	21
III. The Interpretive Approach to Sections 3490 and 5438 Urged by Petitioner Is Erroneous and Has Been Refuted by This Court	24
CONCLUSION	31

TABLE OF CITATIONS

Cases	<i>Page</i>
Cato v. United States, 242 F. 2d 364 (1957), cert. granted U. S.	16
In re Heath, 144 U. S. 92 (1892)	8
Kendall v. United States, 12 Pet. (37 U. S.) 524 (1838)	8
Lindgren v. United States Shipping Board Merchant Fleet Corporation, 55 F. 2d 117 (4th Cir.), cert. denied, 286 U. S. 542 (1932)	20
Olson v. Mellon, 4 F. Supp. 947 (W. D. Pa.), affirmed, 71 F. 2d 1021 (3d Cir. 1933), cert. denied, 293 U. S. 615 (1934)	9
Pierce v. United States, 314 U. S. 306 (1941)	14, 17
Proprietors of the Bridges v. Hoboken Land and Improvement Co., 68 U. S. 116 (1864)	18
United States v. Bowman, 260 U. S. 94 (1922)	14
United States ex rel Boyd v. McMurtry, 5 F. Supp. 515 (W. D. Ky. 1933)	9
United States v. Bramblett, 120 F. Supp. 857 (D. C. Dist. 1954), reversed on other grounds, 348 U. S. 503 (1955)	13
United States ex rel Brensilber v. Bausch & Lomb Optical Co., 131 F. 2d 545 (2d Cir. 1942), affirmed 320 U. S. 711 (1943)	7
United States v. Cochran, 235 F. 2d 131 (5th Cir. 1956), cert. denied, 352 U. S. 941 (1957)	22
United States v. Cohn, 270 U. S. 339 (1925)	20
United States ex rel Gilchrist v. American Cotton Cooperative Association, N. 41 F. Supp. 197	19
United States v. Griswold, 24 Fed. 361, affirmed, 30 Fed. 762 (9th Cir. 1885)	10
United States ex rel Kessler v. Mercur Corp., 83 F. 2d 178 (2d Cir.), cert. denied, 299 U. S. 576 (1936)	8

	<i>Page</i>
United States ex rel Marcus v. Hess, 317 U. S. 537 (1942)	7, 21, 22, 29
United States v. Rainwater, 244 F. 2d 27 (8th Cir. 1957), cert. granted, 355 U. S. 811	21
United States v. Rohleder, 157 F. 2d 126 (3d Cir. 1946)	8
United States ex rel Salzman v. Salant & Salant, Inc., 41 F. Supp. 196 (S. D. N. Y. 1938)	19
United States v. Strang, 254 U. S. 491 (1920)	15
United States v. Walter, 263 U. S. 15 (1923)	25, 26

Statutes

Section 35, Criminal Code, 40 Stat. 1015	3, 11
15 U. S. C. Section 714m (a-d)	31
18 U. S. C. Sections 287, 1001	16
Government Corporation Control Act, 31 U. S. C. Section 841 et seq.	27, 28
Section 3490 (R. S. 1878), 12 Stat. 696	2
Section 5438 (R. S. 1878), 12 Stat. 698	3, 10

Miscellaneous

58 Col. L. Rev. 118 (1958)	30
Cong. Globe, 37 Cong. 3d Sess. 952-958	10
56 Cong. Rec. 11,118-11,119	13
7 The Federal Bar Journal 389 (1946)	25
H. R. Rep. No. 668, 65th Cong., 2d Sess. (1918)	12
Lilienthal, The Conduct of Business Enterprises by the Federal Government, 54 Harv. L. Rev. 545 (1941)	29
Sen. Rep. 694, 79th Cong. 1st Sess. (1945)	27, 28

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STATUTES INVOLVED

Petitioner has set forth on page No. 3 of its brief a "statute" that does not and never did exist. Since respondents are certain that the Solicitor General's Office has no desire to mislead this Court, such a critical misstatement of the statutes involved can indicate only one of two things—

either complete carelessness or a complete misunderstanding of the issues involved.

As pointed out in respondents' brief in opposition to the petition for certiorari, there are two statutes involved in this case.* An appreciation of this fact is not a mere formal matter but is absolutely vital to an understanding of the substantive matters presently before this Court, since all language to be construed appears in the criminal statute as opposed to the civil statute.

The False Claims Act is composed of Sections 3490 and 5438 of the Revised Statutes of 1878. The former is a civil statute and the latter is a criminal statute. These two statutes have never been integrated, and Section 3490 has never been acted upon by Congress since its original adoption.

The pertinent parts of these statutes are set forth below:

Section 3490 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 3490 — Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty eight, Title "CRIMES", shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

* This fact has been pointed out to the attorneys for the Government in respondents' briefs in the trial court and in the Circuit Court of Appeals. Nevertheless, the statutes were misquoted by these attorneys in the Circuit Court of Appeals, in the petition to this Court and now in the brief on the merits.

Section 5438 of the Revised Statutes of 1878, 12 Stat. 696, 698:

"Sec. 5438 — Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, . . . shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

A third statute also is important. In 1918, Section 5438, as reenacted, was amended to read as follows, the italicized portion being added by the amendment, Section 35, Criminal Code, 40 Stat. 1015:

"Section 35—Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval services of the United States, or any department thereof, *or any corporation in which the United States of America is a stockholder*, any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent . . . shall be fined not more than \$10,000.00, or imprisoned not more than ten years or both. . . ."

QUESTION PRESENTED

As a matter of law, is the Commodity Credit Corporation, a wholly-owned government corporation, the Government of the United States within the criminal provisions of Sec-

tion 5438 of the Revised Statutes of 1878 so as to impose penalties for claims against the corporation under the provisions of Section 3490 of the Revised Statutes of 1878?

STATEMENT OF THE CASE

The pertinent facts for a decision of the *Cato* case are found in the findings of fact made by the District Court (R. 72-73). The pertinent portion of said findings is set out below:

"6. The Commodity Credit Corporation is a body corporate whose entire capital stock is subscribed by the United States of America, and it is an agency and instrumentality of the United States.

"7. On August 3, 1948, the Commodity Credit Corporation and the defendant, Cato Bros., Incorporated, entered into a Lending Agency Agreement, under which the defendant, Cato Bros., Incorporated, was authorized to make loans to producers of 1948 crop cotton in accordance with the provisions of the said agreement.

"8. During the year 1948, the defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), did submit to the Commodity Credit Corporation, fifty-five (55) letters, transmitting a total of One Thousand One Hundred Seventy-Six (1,176) notes representing loans made pursuant to the Lending Agency Agreement.

"9. The defendants, Cato Bros., Incorporated, Wilfred R. Cato, William R. Cato and Magie L. Dunn (Nee: Stone), transmitted to the Commodity Credit Corporation in thirty (30) of the aforementioned letters of transmittal a total of Seven Hundred Forty-eight (748) notes, in each of which letters there was at least one note covering cotton not actually produced by the person who signed the note as producer, and thus

made and caused to be presented for payment to persons in the civil service of the United States, thirty (30) claims upon the Commodity Credit Corporation knowing the said claims to be false.

"10. The cotton represented by the aforesaid improper notes was held by the Commodity Credit Corporation for an unreasonably long time, during which time it could have disposed of the said cotton at a profit.

"11. The Commodity Credit Corporation failed to accept the offer of the defendants to repurchase the cotton at the price paid for the cotton by the said Corporation."

SUMMARY OF ARGUMENT

This case involves solely the construction of a statute adopted in 1878, and although this is a civil suit, the impact of the civil statute involved is controlled entirely by construction of a criminal statute. Whether or not the Commodity Credit Corporation is or is not a part of the Government of the United States as that term would be understood if used today is of no consequence or probative value in determining the questions now before the Court. The Court must discover and follow the meaning of the terms of the statute as used in the year 1878.

From the authorities and documents referred to below, it is crystal clear to respondents that this terminology as used in the year 1878 did not include a government corporation. For this reason, considerations of present day thought upon the subject reviewing present day statutory enactments, and present day decisions are not in point, unless such authorities purport to discern and comment upon the intent of Congress in 1878 in connection with this particular Act. The question is not whether the Congress or this Court might consider a government corporation, be it the Com-

modity Credit Corporation or some other corporation, a part of the Government of the United States if that term were used at any point after 1878 in any other statute. Rather, the question is whether or not Congress in 1878 in enacting the False Claims Act considered and intended that a government corporation be included within the term "Government of the United States". Respondents submit that Congress did not so intend.

ARGUMENT

I.

A False Claim Against Commodity Credit Corporation, a Wholly-Owned Government Corporation, Is Not a False Claim Against the Government of the United States Within the Meaning of Section 5438 of the Revised Statutes of 1878; Hence No Penalties Can Be Exacted Under Section 3490 of the Revised Statutes of 1878.

The Bill of Complaint (R. 55) filed by the United States in this matter charged that respondents made certain false claims against the Commodity Credit Corporation, and the District Court found as a fact that such false claims were made only against the Commodity Credit Corporation (R. 73). On motion for summary judgment, and in its conclusions of law (R. 69, 74), the District Court held as a matter of law that a false claim against the Commodity Credit Corporation is a false claim against the Government of the United States within the meaning of Section 3490 of the Revised Statutes of 1878.

On appeal, the United States Court of Appeals for the Fourth Circuit reversed this decision, 242 F. 2d 359, and held that a claim against the Commodity Credit Corporation is not a claim against the Government of the United States within the meaning of the False Claims Act.

For the reasons set out below, respondents respectfully submit that the decision of the Fourth Circuit should be affirmed.

A.

Respondents Are Liable to the United States Under Section 3490 Only If They Committed Acts Prohibited by Section 5438 as the Latter Section Read in 1878.

This suit was brought by the United States as plaintiff under the provisions of Sections 3490 and 5438 of the Revised Statutes of 1878. The District Court and the Fourth Circuit recognized, and petitioner apparently has conceded, that these sections are the law of this case and that the amendments of Section 5438 made after 1878 can have no direct bearing on this case. While this fact apparently is not in dispute here, respondents feel that an expose of the reasoning underlying this conclusion is necessary in order for this Court to view this case in its proper context, since the case is one of statutory analysis and nothing more.

Section 3490, the so-called "informer's section", has never been repealed, amended, re-enacted or in any way passed upon by Congress since it was derived from the Act of March 2, 1863, 12 Stat. 696, and stated in the Revised Statutes of 1878.

As can readily be seen from an examination of this section, it incorporates by reference the provisions of Section 5438 of the Revised Statutes of 1878, and it has been established beyond question that liability attaches under Section 3490 only if acts prohibited by Section 5438 have been committed. See *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942); *United States ex rel Brensilber v. Bausch & Lomb Optical Co.*, 131 F. 2d 545 (2d Cir. 1942), affirmed

320 U. S. 711 (1943). This being true, respondents must have committed an act prohibited by Section 5438 in order for the United States to recover in this case. For this reason, as respondents have stated previously, this case is concerned primarily if not wholly with the meaning, construction and history of a criminal statute, Section 5438.

Since its original enactment, Section 5438 has been repealed, re-enacted and amended, but these actions have no direct bearing on the present case, because this section stands, for purposes of suit under Section 3490, as it read when incorporated by the latter section in 1878. See *United States v. Rohleder*, 157 F. 2d 126 (3d Cir. 1946). As Judge Augustus Hand speaking for the Second Circuit held in *United States ex rel Kessler v. Mercur Corporation*, 83 F. 2d 178, 180 (2d Cir.), cert. denied, 299 U. S. 576 (1936):

"While Section 5438 was amended, repealed, and finally since the time when it was referred to in Section 3490 superseded by a broader enactment (18 U.S.C.A. § 80), it stands, insofar as Section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding Act alone appears in the United States Code; for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and 'no subsequent legislation has ever been supposed to affect it. . . .'" (Citing cases)

This principle of statutory construction has been recognized by this Court on several occasions. See *Kendall v. United States*, 12 Pet. (37 U. S.) 524 (1838); *In re Heath*, 141 U. S. 92 (1892). It rests upon a sound principle, for, as this Court stated in *In re Heath, supra*, at page 94:

"No other rule would furnish any certainty as to what was the law and would be adopting prospectively, all changes that might be made in the law."

The vitality of this principle was recognized by the Third Circuit in *Olson v. Mellon*, 4 F. Supp. 947 (W.D. Pa.), affirmed, 71 F. 2d 1021 (3d Cir. 1933), cert. denied, 293 U. S. 615 (1934), wherein the court specifically held that the scope and effect of the civil section, Section 3490, was not affected by an amendment of the criminal section, Section 5438, since the scope of the civil section could not be altered by a change in the criminal section. See also *United States ex rel Boyd v. McMurtry*, 5 F. Supp. 515 (W.D. Ky. 1933).

We must, therefore, read Section 5438 into Section 3490 as the former was stated in 1878 when incorporated by the latter, and, for purposes of this suit, we must discern and follow the meaning of Section 5438 as that meaning was intended in 1878. This meaning may be discovered from two sources—first, legislative history and second, judicial opinion.

B.

The Entire Legislative History of Section 5438 Shows Beyond a Doubt That a Government Corporation Was Not Included Within the Scope of the Section in 1878 When It Was Incorporated by Section 3490.

Keeping in mind that no recovery may be had under Section 3490 unless an act prohibited by Section 5438 has been committed, and that Section 5438 must be read and interpreted as incorporated by Section 3490 in 1878, we turn our attention to the meaning of Section 5438 in 1878.

As incorporated, and as applicable to the question here involved, Section 5438 applied criminal sanctions to the following class:

"Every person who makes or causes to be made, or presents or causes to be presented, . . . *any claim upon or against the Government of the United States, or any department or officer thereof*, knowing such claim to be false, fictitious or fraudulent, . . ." (Emphasis added)

As can readily be seen, sanctions apply to a wrong committed against three possible entities only: (1) the Government of the United States, (2) any department of that Government or (3) any officer of that Government. No mention was made of a government corporation and, as we shall show, a government corporation was not intended to be included.

As pointed out in petitioner's brief, Congress, in enacting Section 5438, evidenced an intent that the section have a broad scope. During and immediately after the Civil War there had been a large number of claims filed against the Government which proved to be false, and this section was intended to be broad so as to reach all ". . . frauds and corruption perpetrated upon the United States and to prevent conspiracies formed for the purpose of defrauding and plundering the Government." 12 Stat. 696, *Cong. Globe*, 37 Cong. 3d Sess., 952-958. The section was purposely made general in order to cover the making of ". . . false and forged claims in any of the thousand modes by which it may be done . . ." *Cong. Globe*, 37 Cong., 3d Sess., 954.

In 1885 one of the first cases considering the scope of these two sections had this to say:

"The statute is a remedial one. It is intended to protect the Treasury against the hungry and unscrupulous hosts that encompass it on every side and should be construed accordingly." *United States v. Griswold*, 24 Fed. 361, affirmed, 30 Fed. 762 (9th Cir. 1885).

It is obvious, therefore, that Section 5438 was intended by Congress to have a rather broad scope; we shall show, however, that this scope did not include a false claim against a government corporation.

In 1908 Section 5438 was amended, and in 1909 it was repealed and superseded by Section 35 of the Criminal Code. 35 Stat. 1015, 1153, 555. None of these changes altered the scope of the original section for purposes of this suit, as readily can be seen by an examination of these changes. And, as we have demonstrated, these changes, in any event, could not affect the scope or meaning of this section as incorporated by Section 3490.

On October 23, 1918, however, a very significant event occurred. Section 5438 (appearing now as Section 35 of the Criminal Code) was amended, 40 Stat. 1015, and the phrase "... or any corporation in which the United States of America is a stockholder. . . ." was added to the original three entities against whom the statute made it a crime to claim falsely. Section 5438, after amendment penalized the following persons:

"Section 35 — Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, . . . any claim upon or against the Government of the United States, or any department or officer thereof, *or any corporation in which the United States of America is a stockholder*, knowing such claim to be false, fictitious, or fraudulent. . . ." (Emphasis added) 40 Stat. 1015. (The italicized words are those added by the amendment.)

This amendment has no direct bearing on Section 3490, since that section incorporates Section 5438 in its 1878 form, and nothing more. It does, however, provide an invaluable, and we think conclusive, indication of the scope of

the words used to describe the three entities described in Section 5438 in 1878.

The question immediately presented is whether this amendment was an extension of the scope of Section 5438 or merely a clarifying declaration of its existing coverage. If, as the respondents contend, it was an extension, obviously a false claim against a government corporation was not prohibited or censured by Section 5438 prior to this amendment, and, for this reason, a recovery under Section 3490 cannot be had for making such a claim, since Section 3490 incorporates only the 1878 meaning of Section 5438.

Examining the language used prior to the amendment petitioner has argued that it is patent that a government corporation was included within the language: "... Government of the United States, or any department or officer thereof . . .", especially since Congress evidenced an intent that the section have a broad scope. We have, however, a clear and unequivocal statement of the intent of Congress to the contrary in amending the section.

Representative Gard, from the Committee on the Judiciary, submitted the Committee's report on the amendment to the House of Representatives. The following passage is pertinent to the issue in question:

"The amendments serve to fully re-enact and reinforce the provisions of Section 35 of the Criminal Code so that it will include all the offenses heretofore contained therein and an offense against 'any corporation in which the United States of America is a stockholder' either as to the presentation of a false claim, a falsification of statements or representations, the use of any false bill, receipt, voucher, etc., against the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, . . ." (Emphasis added) H. R. Rep. No. 668, 65th Cong., 2d Sess. (1918).

After the bill was read, Representative Igoe, in the absence of the chairman of the committee, explained the bill as follows:

"Mr. Igoe . . . The only amendments to the existing laws are the *extension of the penalty of this act to false and fraudulent claims that are presented against corporations in which the United States is a stockholder*, and also the punishment of the disposal of the property belonging to the Army or Navy and pledging it or selling it or disposing of it wrongfully." (Emphasis added) 56 Cong. Rec. 11, 118 (1918).

After reading the bill in its naked form as it was received from the Senate, Mr. Igoe went on to say:

"That as I recall it was all there was to this bill as it came from the Senate, and to it was subsequently attached the rest of Section 35 as amended *to extend the law to false and fraudulent claims made against a corporation in which the United States is a stockholder*." (Emphasis added) 56 Cong. Rec. 11, 119 (1918).

It is apparent, therefore, that Congress in passing the amendment intended to extend the scope of the Act, and that Section 5438 as enacted did not penalize false claims against government corporations, since Congress had not intended to censure such claims in enacting the section in 1878.

The courts uniformly have found this to have been the intent of Congress in this matter. In *United States v. Bramblett*, 120 F. Supp. 857, 859 (D. C. Dist. 1954), the District Court, stated:

"Congress then passed the amendment of October 23, 1918, 40 Stat. 1015, *since unsuccessful attempts had*

been made under Section 35 to punish persons committing frauds against some of the corporations created by Congress during World War I in which the Government owned all or part of the stock. The amended section added, among other things, the words 'any corporation in which the United States of America is a stockholder.'" (Emphasis added)

This Court on appeal, reversed, which reversal does not concern the corporation question raised here, 348 U. S. 503 (1955), and while detailing the history of Sections 3490 and 5438, stated in a footnote:

"Section 35 was in turn revised in 1918, 40 Stat. 1015. The false claims provision was extended to cover corporations in which the United States held stock: . . ."

Here, this Court merely followed its prior dictum in *Pierce v. United States*, 314 U. S. 306 (1941), where it indicated that the 1918 amendment of Section 5438 was made to meet the then new development of government administrative corporations, and was an extension of the scope of this section beyond its scope as incorporated by Section 3490 in 1878.

The conclusive case on this point is *United States v. Bowman*, 260 U. S. 94 (1922), in which the Government indicted one Bowman, charging him with having made a false claim against the Emergency Fleet Corporation in violation of Section 5438 as amended (Section 35 of the Criminal Code). In speaking of the 1918 amendment this Court stated as follows at page 101:

"It is directed generally against whoever presents a false claim against the United States, knowing it to be such, to any officer of the civil, military or naval

service, or to any department thereof, or any corporation in which the United States is a stockholder, or whoever enters a conspiracy to do these things. The section was amended in 1918 to include a corporation in which the United States owns stock. This was evidently intended to protect the Emergency Fleet Corporation, in which the United States was the sole stockholder, from fraud of this character."

It is to be noted that this decision was based upon the fact that the United States was the *sole* stockholder in the Fleet Corporation and no reliance or mention was made of the tenuous distinction urged by petitioner in its brief to the effect that the Fleet Corporation was in some way a "hybrid-entity" partly owned by private individuals (Br. 24-25; 36).

Further, in *United States v. Strang*, 254 U. S. 491, 493 (1920), this Court held regarding the Fleet Corporation, that: "Notwithstanding *all* its stock was owned by the United States, it must be regarded as a separate entity." This Court further pointed out that the 1918 amendment of Section 5438 (Section 35, Criminal Code) was the language which brought government corporations within the ambit of Section 5438. *Id.* at 493-494.

Without more, the decisions in these two cases should be a complete answer to the entire argument advanced by petitioner which purports to deal with the "reality" of the situation. This Court recognized at an early date that whether or not all the stock or part of the stock was owned by the United States was not significant, since it held that even if all the stock were owned by the United States the corporation still was not included by the Act until the amendment of 1918.

Recognizing this, Congress has carried forward the corporation provision of Section 5438, as amended, into Sec-

tions 287 and 1001 of Title 18, U. S. C., by using the word "agency" and defining agency in Title 18, U. S. C., Section 6, as including "... any corporation in which the United States has a proprietary interest. . . ."

It seems obvious that Congress in 1878 did not include a government corporation within the purview of Section 5438. We have no problem of strict or liberal construction. Congress has expressly indicated that government corporations were not included in 1878. Judicial construction of the most liberal nature cannot make an enlargement which Congress has indicated is unwarranted. As the Court below pointed out, 242 F. 2d 364:

"... the language is not broad enough to cover such claims, however liberal an interpretation be placed upon it."

It seems strange that Congress did not intend that a government corporation be included by Section 5438 in 1878, especially in view of the pronouncements at that time; there is, however, a very clear and logical answer to this apparent anomaly.

C.

Judicial Construction Has Determined That Government Corporations Were Not Included in Section 5438 in 1878 and in Acts Using Similar Phraseology Adopted During That Period.

Considering the language of Section 5438 prior to the amendment and without reference to legislative history of the section, it is apparent why government corporations were not intended to be included, even without the aid of the clear pronouncement of Congress to this effect:

The Supreme Court has decided a case which we submit

is the controlling authority on this question and which presents us with a complete answer. In *Pierce v. United States*, 314 U. S. 306 (1941), this Court held that the defendant in the case could not be prosecuted criminally under a statute (Section 32 of the Criminal Code) making it a crime fraudulently to "... pretend to be an officer or employee acting under ... the authority of the *United States, or any department, or any officer of the government thereof* ..." since the defendant had not pretended to be such an employee but instead had pretended to be an employee of TVA, a wholly owned government corporation, and an agency and instrumentality of the United States, which was not covered by the statute.

The rationale of the decision is that a government corporation was not one of the three entities included in the Act when it was passed. Justice Reed stated for this Court at pages 310-311:

"The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines or generating plants. The amendments, subsequent to the occasions fixed by the indictment, extended its scope first to the Home Owners Loan Corporation (citing authority), and later to all corporations owned or controlled by the United States, 52 Stat. at L. 82, Chap. 37. These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."

This case, we submit, is on all fours with the present case, not only in principle and language, but in background as well, for Section 32 of the Criminal Code, like Sections 3490 and 5438, grew out of the evils practiced during and after the Civil War. This Court recognized the identical nature of these sections, and in a dictum appearing on page 312 of the opinion states that a legislative extension of Section 5438 (Section 35 of the Criminal Code) was made in 1918 to meet the new development of government corporations.

It is clear now how Congress could state in 1878 that it intended to reach all frauds against the United States and yet have it be necessary in 1918 to extend the scope of Section 5438 in order to reach claims against government corporations. The answer is simple; in 1878 Congress never dreamed of any such entity as a government corporation, and, therefore, its broadest intentions and declarations could not encompass such an entity. Only when this new entity appeared in Government was it possible for Congress to include it.

The petitioner apparently has conceded this point to all intents and purposes, stating as follows on page 23 of its brief: "Concededly, the use of wholly owned government corporations to execute public programs and expend public monies is, for all practical purposes, a contemporary innovation. It is unlikely, therefore, that this method of carrying on the government's business was of specific concern to the Congress either in 1863 or in 1878."

This Court in *Proprietors of the Bridges v. Hoboken Land and Improvement Company*, 68 U. S. 116 (1864), established the rule of construction for which respondents are contending here. There, this Court held that: "It does not, therefore, follow that when a word was used in a statute or a contract seventy years since, that it must be held to

include everything to which the same word is applied at the present day. . . . We are, therefore, quite clear that the adoption of that word to express the modern invention does not bring it within the terms of the Act. . . ." *Id.* at 148-149.

In 1878 Congress spoke in broad terms of the "Government of the United States". Today, this term by common usage perhaps might include a government corporation. It did not include such a corporation in 1878 since Congress never conceived of such an entity and could not have intended to include it. The modern usage cannot, therefore, change the scope of the section as adopted and fixed in 1878. This is all the more apparent when it is remembered that Section 5438 is a criminal statute and must not be enlarged by construction.

In *United States ex rel Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D. N.Y. 1938), the Court specifically considered the question presently before this Court and held that a government corporation (The Red Cross) although an agency of the United States, is not "the Government of the United States, a department or officer thereof", as these words were intended when used in Section 5438 in 1878; therefore, no civil recovery was allowed under Section 3490 for certain false claims made against such a corporation. The Court dismissed the Government's complaint on a motion by defendants for judgment on the pleadings. This case is commended to this Court as a holding on all fours with the instant case and is direct authority for respondents' contention here.

Apparently Judge Knox of the District Court in the Southern District of New York decided another case on the same question and reached the same result. *United States ex rel Gilchrist v. American Cotton Cooperative Association*. See note, 41 F. Supp. 197. Unfortunately, his opin-

ion in that case is not published. Neither of these cases was ever appealed by the Government.

In *United States v. Cohn*, 270 U. S. 339 (1925), this Court held that Section 5438 concerned only claims against the Government based upon the Government's liability to the claimant. In the present case there was no liability on the Government and nothing was submitted to anyone except the Commodity Credit Corporation.

As then Circuit Judge, now Chief Judge, Parker of the Fourth Circuit held in *Ludgren v. United States Shipping Board Merchant Fleet Corporation*, 55 F. 2d 117 (4th Cir.), cert. denied, 286 U. S. 542 (1932):

"Plaintiff contends, however, that this suit and the former suit are virtually against the same defendant because the United States owns the stock of the Fleet Corporation, and the Fleet Corporation is an agency of the United States. This position cannot be sustained. The United States is a sovereign power representing in its corporate capacity the people of the country and immune from suit, except as it may give its consent thereto. The Fleet Corporation is a private corporation of the District of Columbia, created under the laws of the United States, with power to sue and be sued in the same manner as other corporations. Although the United States owns its stock, it is a distinct entity such as other corporations are distinct from their stockholders. A suit against it is not a suit against the United States, and a suit against the United States is not a suit against it." (Emphasis added)

Obviously, any judgment obtained in such a suit ultimately would be paid by the Government of the United States. This could not affect the case. As a matter of fact and law, a corporation is a separate entity from its stockholders, and this fundamental principle is to be applied to government cor-

porations as well as to other corporations. This principle of law, the legislative history of Sections 3490 and 5438, the decision of this Court in the *Pierce* case, and the decisions of the United States District Court for the Southern District of New York, leave no doubt in respondents' minds as to the true meaning and application of Sections 3490 and 5438.

II.

It Will Be Error for This Court to Give a Liberal Construction to Section 5438 So As To Include a Government Corporation.

Petitioner is urging upon this Court the very error committed by the District Court in this case and by the Eighth Circuit in the case of *United States v. Rainwater*, 244 F. 2d 27 (8th Cir. 1957), and that is, that this Court should give a liberal interpretation to the provisions of Section 5438 which are incorporated by Section 3490. The petitioner calls it a "functional" interpretation dictated by the *Hess* case (Br. 21). As the Court stated in the *Rainwater* case, 244 F. 2d 32: "We are not dealing with the criminal aspects of a statute requiring 'utmost strictness' in construction." This Court is most certainly dealing with the scope of a criminal statute. Nothing makes this more certain than the case of *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942), the very case relied upon by petitioner, in which this Court in speaking of the construction to be given to Sections 3490 and 5438 stated at page 542 of its opinion:

"True, § 5438 is criminal and for that reason in interpreting so much of its language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included." (Emphasis added)

Respondents think it uncontroverted that no construction of Section 3490 can be made except by a direct construction of the criminal section, Section 5438. True, Section 3490 provides for a civil recovery, but it incorporates and depends upon the provisions of Section 5438 which section is, and always has been, criminal. This entire case concerns the scope and meaning of the language used in Section 5438, the criminal section. Since this language details a crime, it must be strictly construed if it is to be construed at all. It is apparent that the scope of Section 5438 cannot be broadened for purposes of suit under Section 3490 without broadening the meaning of Section 5438 for criminal prosecution also. This Court fully recognized this in the *Hess* case, at page 542 of the opinion:

"This 'qui tam policy' (allowing informers to institute civil suit under Section 3490) cannot be used to detract from the meaning of the language in the criminal section and we cannot say that the same substantive language has one meaning if criminal prosecutions are brought by public officials and quite a different meaning where the same language is invoked (civilly) by an informer." (Emphasis added)

The two sections involved here are interrelated. If we restrict Section 5438 in a criminal suit it must bear the same meaning in a civil suit. The same principle applies to any attempted extension of Section 5438's meaning.

Far from dictating a "functional" interpretation the *Hess* case makes it abundantly clear that the words of Section 5438 must be construed strictly when incorporated into Section 3490.

As the Fifth Circuit pointed out in *United States v. Cochran*, 235 F. 2d 131, 133 (5th Cir. 1956), cert. denied, 352 U. S. 941 (1957), in affirming the lower court's deci-

sion that no "claim" had been made against the Government within the meaning of the False Claims Act:

"... the United States, in its brief, under the heading, 'A. The civil remedy provided by the False Claims Act must be liberally construed', is here stressing 'the need for a functional interpretation of the statute' and citing in support *United States ex rel Marcus v. Hess*, 317 U. S. 537, 63 S. Ct. 379, 87 L. Ed. 443. While not making its meaning completely clear, it seems to be urging upon us: that Section 231 must be viewed, not as ordinary penalty statutes are viewed, as confined in scope and operation to and by the language used, but as a sort of catch all statute announcing and containing a general declaration of principle against fraud and over-reaching; that proof that the person proceeded against under it had done any specific thing denounced as an offense is not required, but only proof that the defendant has acted badly toward the United States; and that, under such proof, he must, and may be, subjected, to the penalties the statute provides, not for having violated its terms, but for transgressing its spirit."

The Fifth Circuit refused to follow such an interpretation of the Act and held that an offense defined by the Act must be committed before penalties will attach and that the Act is not to be given a sweeping, catch-all interpretation, but, following the *Hess* case, must be interpreted as to its true meaning in the light of its legislative history.

Respondents are not asking that Section 5438 as incorporated by Section 3490 be construed with any more strictness than would a normal criminal statute but they are pointing out that it should be construed with at least that much strictness, as this Court recognized in the *Hess* case.

In any event, as respondents have pointed out before there is nothing to construe, since the meaning of the statute, at

least in this particular, has been made abundantly clear Congress as well as by the courts.

III.

The Interpretive Approach to Sections 3490 and 5438 Urged by Petitioner Is Erroneous and Has Been Refuted by This Court.

At no point in this case has petitioner ever contended that Section 5438 as adopted in 1878 is not the controlling statute involved. Indeed, it is precluded from doing so by the mere fact that this is the statute under which this suit was instituted (R. 55). Yet petitioner is now, as it must, urging upon this Court a consideration of the "substantive realities" and the adoption of a "functional interpretation" of Section 5438 (Br. 21). Stripped of verbiage and fancy phrases, petitioner is urging quite simply that this Court ignore the plain meaning of the section and is requesting judicial amendment of the False Claims Act which will effect nullify the amendment to the Act made in 1918. As pointed out before, the only "substantive realities" presented here are that the False Claims Act did not encompass government corporation until 1918 and that this suit is controlled by the False Claims Act as it read in 1878, and the only "functional interpretation" of the Act permitted under the *Hess* case is that amount of interpretation allowed for any criminal statute: *i.e.*, it must not be extended by interpretation.

Respondents feel it is obvious that this Court is in no way concerned with the theoretical or practical distinctions between a government corporation and the Government of the United States urged by petitioner as if the words were being discussed in the light of modern da

developments. As pointed out before, this Court must discern and follow the 1878 meaning of Section 5438.

In a rather exhaustive article appearing in 7 *The Federal Bar Journal* 389 (1946), Mr. Claude T. Coffman who was at the time attorney for the Commodity Credit Corporation Division of the Solicitor's Office, Department of Agriculture, stated at page 412 of his article entitled *Legal Status of Government Corporations*:

"When a federal statute refers to the 'United States', or the 'United States Government', or 'The Departments of the Government of the United States', is a government corporation also included? . . . An analysis of the cases in this field indicates that the key to issues of this type is to be found more in the legislative background of the particular statute being construed than in any inherent nature of government corporations."

This point is self-evident to respondents. This Court in not dealing with the words in any abstract sense but only as an organic part of a statute. Petitioner at no point in its brief has related its argument to the history and development of the statute in question. Respondents cannot feel that this Court will make the impact of Section 5438, a criminal statute, depend upon the peculiarities of incorporation of the various government corporations so that the section may apply to some and not to others. This is not the definiteness that is required of all criminal statutes.

In any event, petitioner's entire argument that a different result is obtained by looking solely at the present day structure of Commodity Credit Corporation and ignoring the structure of the False Claims Act is answered and controlled by a prior decision of this Court.

In the case of *United States v. Walter*, 263 U. S. 15 (1923), certain defendants were indicted under Section

5438, as amended in 1918 (Section 35, Criminal Code), for conspiring to present false or fraudulent claims against the United States Emergency Fleet Corporation. The Government should have had no trouble, since Section 5438 had by then been amended to include false claims against "... any corporation in which the United States of America is a stockholder." The District Court, however, sustained a demurrer to the indictment on the ground that the 1918 amendment must be read as extending Section 5438 to cover false claims against *any* corporation in which the United States owned stock regardless of the size of this stock ownership and, so construed, went beyond the power of Congress. See 291 Fed. 622.

On appeal, the Supreme Court in speaking of the 1918 amendment through Mr. Justice Holmes discussed the phraseology of the 1918 amendment and concluded that such phraseology must be limited, holding at page 18 of the opinion:

"We are of the opinion that the Act of 1918 should be construed to refer only to corporations like the Fleet Corporation, that are instrumentalities of the government, and in which, for that reason, it owns stock."
(Emphasis added)

We now have a complete answer to the argument put forward by the petitioner. Not only did Section 5438 prior to its amendment in 1918 not cover corporations such as the Commodity Credit Corporation but the amendment itself covered *only* such corporations, since if the amendment were any broader it would have been unconstitutional. It is clear, therefore, that neither the chartering of the Commodity Credit Corporation nor the adoption of the Government Corporation Control Act served to thrust the Commodity

Credit Corporation into the unamended provisions of Section 5438 by making the corporation an instrumentality of the Government. Rather, these actions, if anything, merely brought the corporation within the ambit of the 1918 amendment to the statute. Respondent has clearly demonstrated that the 1918 amendment has no direct bearing here.

As pointed out previously, the cases dealing with the Emergency Fleet Corporation dealt with it as a wholly-owned government corporation and relied not at all upon any of the tenuous distinctions alluded to in the brief filed by the petitioner. In effect, petitioner has asked this Court to sweep aside the corporate entity and in a search for the "realities" of the situation stretch the Act to cover the stockholder, the United States.

Although respondents contend that the amount of control exercised by the Government over the Commodity Credit Corporation is immaterial, since ownership of the entire stock of the corporation carries with it absolute control and such ownership has been held not to bring a corporation within the purview of Section 5438 prior to the 1918 amendment, it should be pointed out that this potential control is not as fully exercised as petitioner would lead the Court to believe.

Indeed, in enacting the Government Corporation Control Act, 31 U. S. C. §841, *et seq.*, Congress was careful to make clear that it did not desire to exercise more control over the corporation than was necessary to preserve the Government's rights as a stockholder. Far from making the corporation a mere legal shell, Congress desired to leave it as autonomous as possible, consonant with good government. In this connection, the Senate Committee, recommending the Act stated at page 7 of Sen. Rep. 694, 79th Cong., 1st Sess. (1945):

"The corporate form of organization is a useful device for carrying out a variety of government services and programs, of a continuing as well as an emergency character. It is generally agreed that the corporate form loses much of its peculiar value without reasonable autonomy and flexibility in its day-to-day decisions and operations. The budget and financial controls imposed upon the government corporations should not deprive them of this freedom and flexibility in carrying out authorized programs to a greater extent than is necessary to conform their operations to the program of the government and the will of Congress."

In accord with this avowed purpose, while the Government Corporation Control Act provides for an audit of the financial affairs of all government corporations, this audit is not what is known as a "governmental" audit, which is generally made to determine whether the expenditures of agencies or departments of the Government are for valid obligations of the Government, but is rather what has been called a "commercial" audit, being the type used in the business world solely to close the books of any normal corporation. See Sen. Rep. 694, 79th Cong., 1st Sess. (1945), pages 8-9.

The audit is not for purposes of verifying the propriety or advisability of entering into the obligations incurred by the corporation but is merely for the purpose of obtaining a verified account of the expenditures of the corporation during the audited period. In this connection, it is important to note that in 31 U. S. C. A. §852, a portion of the Government Corporation Control Act, Congress provided that in certain circumstances the Government might treat a government corporation as if it were any other agency of the Government for accounting purposes. The section immediately points out, however, that: "The corporate entity shall not be affected by this section." So, even at this

point, the Congress was quick to preserve the status of the corporation as a separate legal entity from the Government of the United States. Freedom from the political and administrative entanglements found in a government department was and is the chief reason for the employment of government corporations. This independence is vital, and such corporations are not mere bookkeeping devices. See Lilienthal *The Conduct of Business Enterprises by the Federal Government*, 54 Harv. L. Rev. 545 (1941).

Petitioner has cited the Court to its decision in *United States ex rel Marcus v. Hess*, 317 U. S. 537 (1942), as the controlling decision for purposes of this case. Respondents think it is obvious that this case is not controlling.

There, this Court examined the entire record and determined that as a matter of fact the claims had been made against the Government of the United States although an intermediary State agency was involved. In this case, the trial court has made a finding of fact that the claims were submitted to the Commodity Credit Corporation a wholly-owned government corporation (R. 73). The trial court then concluded, as a matter of law, that such a claim was one against the Government of the United States within the meaning of Section 3490 of the Revised Statutes of 1878. At no point in this case has the Commodity Credit Corporation been treated as a mere intermediary. The Commodity Credit Corporation is not an intermediary which receives claims and transmits them for reliance and payment by the United States as was done in the *Hess* case. The claims are submitted to the corporation and it either rejects them or pays them and no claims are in turn submitted by the corporation to the Government.

More important still, the *Hess* case establishes a rule of construction to be followed in cases where the scope of the False Claims Act is not clear. In the present case, Congress

and the courts have made the scope of the act manifest related to government corporations. Such corporations were not intended to be included and were not included by Congress in 1878. Whether this Court today might consider the funds of the corporation the funds of the United States or not should not be controlling, since such a corporate entity regardless of whose funds it uses, was not included within the Act upon its adoption. As stated in an article reviewing the decisions of the Eighth Circuit in the *Rainwater* case *supra*, and the lower court in this case, appearing in 58 Co. L. Rev. 118 (1958) at 121:

"The argument advanced in the *McNinch* case, which the instant Court (the 8th Circuit in *Rainwater*) failed to answer, seems legally irrefutable. Where the criminal statute was subsequently amended to extend its prohibitions to false claims against government corporations, it is probable that Congress thought that the scope of the original enactment which incorporated the criminal act before its amendment did not include such a prohibition. Thus it seems that before the False Claims Act can properly apply to the Commodity Credit Corporation, Congress must so provide."

Other agencies or entities may be included within the Act since Government funds may or may not be expended, but regardless of whether this Court deems these funds to be those of the Government or not, it is clear that the Commodity Credit Corporation, or any government corporation, is, in effect, specifically excluded from the coverage of the False Claims Act as it presently stands.

The two prime fundamental legal principles before the Court in this case, respondents submit, are that a criminal statute must not be extended by construction and that a crime must be defined with appropriate definiteness. It is clear in respondents' minds that violence will be done to both

these concepts if the False Claims Act is stretched to include the claims submitted by respondents.

One word in closing about the concern of the Government over its supposed loss of funds if suit is not permitted under this particular Act. It is perfectly well settled, and has never been disputed, that the Government can recover damages in these cases in a simple common-law action without the benefit of any particular statute. This will make the Government whole. Also, ample criminal provisions exist for the punishment of any persons making such claims against the Commodity Credit Corporation so that future claims of this nature, if of an undesirable character, can be prevented. See 15 U. S. C. §714m(a-d). In any event, in the present case the trial court concluded as a matter of law that the Government had suffered no legally recoverable damages (R. 74). For this reason, the Government's case boils down to a suit for numerous penalties and the Government is whole regardless of the result of this appeal.

CONCLUSION

For the reasons set forth above, respondents respectfully submit that the decision of the United States Court of Appeals for the Fourth Circuit in the *Cato* case should be affirmed.

Respectfully submitted,

A. C. EPPS
CHARLES W. LAUGHLIN
506 Mutual Building
Richmond 19, Virginia
*Counsel for Cato Bros., Inc.,
Wilfred R. Cato, William R.
Cato, and Magie L. Dunn
(nee: Magie L. Stone)*

CHRISTIAN, BARTON, PARKER & BOYD
Of Counsel

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